IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL.	§	
vs.	§	CIVIL ACTION NO. 2:03-CV-354
RICK PERRY, ET AL.	§	Consolidated

THE JACKSON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Jackson Plaintiffs[1] hereby move for summary judgment on the ground that Article I of the United States Constitution prohibits a State from pursuing partisan advantage by replacing a perfectly lawful congressional districting plan after it has been used in one or more elections and before the next census.

At the beginning of each decade, the Federal Government takes a new census of population, Congress uses those census data to reapportion seats in the House of Representatives among the 50 States, and the States then must redraw their congressional districts. That process is not only politically charged, but also disruptive to the voters, many of whom are shifted into new congressional districts where they will no longer be served by the Representatives they have come to know. But that disruption is necessary, once a decade, to guarantee equal representation for equal numbers of people, as mandated by the one-person, one-vote rule under Article I of the Federal Constitution.

If a State fails to perform the required redistricting, then a court must step into the legislature's shoes to ensure compliance with one-person, one-vote. But once a new redistricting

[1] The term "Jackson Plaintiffs" includes all plaintiffs included in the Amended Complaint filed on November 7, 2003 on behalf of the existing Jackson, Mayfield, and Manley plaintiffs and some additional plaintiffs included there for the first time.

plan – whether adopted by the state legislature or by the federal judiciary – has been used in a congressional election, our constitutional scheme prohibits alteration of the plan until it is invalidated by a court or made obsolete by the next census. More frequent reshuffling of constituents among districts would have all the drawbacks of normal redistricting without the offsetting benefit of leveling the unequal populations revealed by the latest census.

Thus, the Texas Legislature may redistrict only during the window of time between the release of the decennial census data (*e.g.*, in early 2001) and the start of the orderly election process leading to the next primary and general elections for Congress (in late 2001). Having refused to enact a new plan during that window, the Texas Legislature defaulted, creating a vacuum that this Court properly filled by drawing and adopting the congressional redistricting map known as "Plan 1151C." Now that Plan 1151C has been upheld by the U.S. Supreme Court and has been used in the 2002 primary and general elections, it must remain in effect for the rest of the decade. Allowing any other plan to take effect would undermine the fundamental principle of democratic accountability that animates Article I of the Federal Constitution.

STATEMENT OF THE QUESTION PRESENTED

Whether Article I of the United States Constitution prohibits the State of Texas from replacing a perfectly lawful congressional districting plan after it has been used in one or more elections and before the next census.

STATEMENT OF FACTS

Although the question presented in this summary-judgment motion can be decided as a pure matter of law, the facts of this case illustrate vividly why the Federal Constitution prohibits States from needlessly altering congressional districts in the middle of a decade. The Jackson Plaintiffs therefore provide this brief statement of the facts.

The 2000 federal decennial census showed that Texas's relatively rapid growth rate in the 1990s entitled it to two additional Representatives in Congress, raising the size of the State's congressional delegation from 30 to 32. Federal law required Texas to create 32 "single-member" congressional districts, each of which would elect one Representative. *See* 2 U.S.C. § 2c. The strict one-person, one-vote rule that applies to the House of Representatives under Article I of the Federal Constitution required that these 32 districts be virtually identical in population. *See Karcher v. Daggett*, 462 U.S. 725, 730-44 (1983) (citing U.S. CONST. art. I, § 2, cl. 1); *Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964) (same).

The task of replacing the 30 old malapportioned districts from the 1990s with 32 new equipopulous ones based on the 2000 census fell initially to the Texas Legislature. The Texas Constitution provides that the Legislature "shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." TEX. CONST. art. III, § 28. Although the Texas Constitution does not expressly address congressional districts, the Legislature's consistent practice has been to handle congressional redistricting in a similar manner.

In March 2001, the U.S. Census Bureau delivered Texas's detailed, block-by-block redistricting data to the Governor and the Legislature's leaders. At the time, the Governor and the leaders of the Texas Senate were Republicans and the leaders of the Texas House of Representatives were Democrats. With primaries set for March 2002, and with election officials needing several months to prepare for orderly balloting, the State had to enact its new congressional redistricting statute either during the 77th Legislature's regular session, which would end in May 2001, or in a special session in the summer or fall of 2001. But the

Legislature failed to reach agreement on a new congressional map in its 2001 regular session, and Governor Rick Perry opted not to call a special session.

Several voters filed suit in state and federal courts asking them to invalidate the old 30-district plan and replace it with a lawful 32-district plan in time for the 2002 elections. Of course, the old map's invalidity was uncontroversial, but the proper contours of the new 32-district remedial map were hotly disputed. The state-court litigation, however, did not result in the adoption of a new map. The twin defaults of the state legislature and the state judiciary left this Court "with the 'unwelcome obligation of performing in [their] stead.'" *Balderas v. Texas*, Civil No. 6:01-CV-158, slip op. at 1 (E.D. Tex. Nov. 14, 2001) (three-judge court) (*per curiam*) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)), *summarily aff'd*, 536 U.S. 919 (2002).

On November 14, 2001, the three-judge Court, based on findings that the 30 existing congressional districts in Texas were unconstitutional, and based upon the continuing "failure of the State to produce a congressional redistricting plan," imposed on the State of Texas a new 32-district congressional map known as "Plan 1151C." *Balderas*, slip op. at 1. This Court rendered a final judgment "declaring that the existing congressional districts in the State of Texas are unconstitutionally malapportioned and adopting Plan 1151C as the remedial congressional redistricting plan for the State of Texas." Final Judgment, *Balderas v. Texas*, Civil No. 6:01-CV-158, at 1 (E.D. Tex. Nov. 14, 2001) (three-judge court), *summarily aff'd*, 536 U.S. 919 (2002).

The Court stated that it was following the same process of drawing districts used by Rice University political-science professor John R. Alford, the State's expert witness. That process was grounded in "principles of district line-drawing that stand politically neutral." *Balderas*, slip op. at 5. Moreover, the Court "checked [its] plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results

against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 9. The Court found that its plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Id.* Recognizing Texas's "traditional state interest in the power of its congressional delegation" and the relationship between seniority and congressional leadership, the Court confirmed that the plan did not pair any incumbent Representative with another incumbent and did not harm the reelection prospects of "three Democrats and three Republicans" holding "unique, major leadership posts" in Congress. *Id.* at 8. Although the plan had to increase the number of districts from 30 to 32 and account for substantial population shifts within the State, it managed to keep 78% of all Texans in the same district as their incumbent Members of Congress.

Neither the State of Texas nor any other Defendant appealed the Court's decision. The only appeal was taken by a group of Hispanic voters known as the "Balderas Plaintiffs." The State of Texas filed a motion asking the United States Supreme Court to affirm this Court's judgment. The Supreme Court summarily affirmed on June 17, 2002. *Balderas v. Texas,* 536 U.S. 919 (2002). The Court-drawn Plan 1151C governed the 2002 elections.

Although Plan 1151C created several potentially very competitive districts, based on recent statewide elections (for President, U.S. Senator, Governor, Lieutenant Governor, and so on) it appeared that 20 districts leaned at least somewhat Republican and 12 leaned at least somewhat Democratic. But the November 2002 general elections generated a congressional delegation with 15 Republicans and 17 Democrats. The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts reelected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party). Seven of the incumbents – six Democrats and one Republican – prevailed

even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party. In other words, seven current Members of Congress won because they attracted split-ticket voters; without that support, each would have lost to a challenger from the district's dominant political party. Those seven Congressmen (most of whom represent relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Aside from the seven districts where split-ticket voters played a key role, 14 of the new districts voted consistently Republican and 11 voted consistently Democratic. But because six of the seven incumbents who won the relatively competitive seats were Democrats, Democrats won more of the State's 32 seats and Republicans won fewer seats than the current statewide balance of power alone would have suggested.

At the same time that Republicans were picking up two new congressional seats, they also were making gains at the state-legislative level. As a result, Republicans won a majority of seats in the Texas House of Representatives and, with it, unified control of the state government for the first time in decades.

In 2003, the newly elected 78th Legislature convened in regular session. The Texas House began considering congressional redistricting and its Redistricting Committee ultimately passed a plan and sent it to the full House for consideration. According to press reports at the time, the unprecedented push for mid-decade congressional redistricting was driven by Texas Congressman and Majority Leader Tom DeLay, who had flown to Austin to kick off the effort. Congressman DeLay stated publicly: "I'm the Majority Leader, and we want more seats." Suzanne Gamboa, *DeLay, Texas Dems in Redistricting Fight*, Associated Press, May 7, 2003. During the 2003 regular session, as a critical deadline approached for passing legislation in the

Texas House, a group of Democratic House Members left the State and broke quorum for a week, setting off a frenzied reaction.

Governor Perry and the Speaker of the Texas House of Representatives Tom Craddick (both Defendants in this case) asked state law-enforcement officials to physically compel the Democrats to return. Texas Department of Public Safety (DPS) troopers were sent to a neonatal unit to try to "nab" one legislator who might be visiting his prematurely born twins. *See* April Castro, *Troopers Sent to Find Lawmakers Who Skipped Session*, Associated Press, May 13, 2003. Congressman DeLay's office attempted to enlist federal assistance from the Department of Homeland Security, the Department of Transportation, and the Department of Justice to locate and apprehend the Democrats.[2] None of these tactics succeeded in regaining a quorum. Consequently, the legislative deadline passed without action by the Texas House, effectively killing the congressional redistricting measure for the regular session.

During the 2003 regular session, the Chair of the House Committee on Redistricting, Representative Joe Crabb, asked Texas Attorney General Greg Abbott if the Texas Legislature had a mandated responsibility to perform congressional redistricting in 2003. On April 23, 2003, the Texas Attorney General issued his opinion, stating that the Legislature was not mandated to act nor could it be compelled to do so. The Attorney General's opinion also stated that the congressional plan drawn by the *Balderas* Court was a valid map that could govern congressional elections for the entire decade: "Unless and until the Legislature adopts [a new] plan, the map drawn in 2002 [*sic*] by the three-judge court in *Balderas v. Texas* will continue to

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[2] *See* Office of the Inspector General, U.S. Dep't of Justice, *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators*, at 4-6 (Aug. 12, 2003), *available at* http://www.usdoj.gov/oig/special/03-08a/final.pdf; Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Dep't of Transportation, *Federal Aviation Administration Efforts to Locate Aircraft N711RD* (July 15, 2003) (testimony to House Comm. on Transp. and Infrastructure), *available at* http://www.oig.dot.gov/show_pdf.php?id=1127; Office of Inspector General, U.S. Department of Homeland Security, *Report of Investigation IN03-OIG-0662-S*, at 1, *available at* http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf.

be the congressional redistricting plan for Texas." Op. Tex. Att'y Gen. No. GA-0063, at 5 (Apr. 23, 2003), *available at* http://www.oag.state.tx.us/opinopen/ opinions/op50abbott/ga-0063.htm.

Governor Perry announced shortly after the 2003 regular session ended that he was calling the Texas Legislature into special session to take up congressional redistricting. This marked the first time in history that the Texas Legislature would be convened for the purpose of enacting a new congressional plan to replace a legally valid map.

Just before the special session began, the Texas House, which had voted not to hold public field hearings on congressional redistricting during the regular session, reversed itself and decided to hold hearings across the State. The Texas Senate also scheduled a series of field hearings. At these public hearings, more than 5,000 Texas voters appeared and gave their views on the propriety of mid-decade congressional redistricting. More than 90% of them opposed the Texas Legislature's taking up the issue. Among these opponents was Rice University political science professor John Alford, who had testified for the state Defendants in the *Balderas* trial in October 2001. Every major newspaper in the State editorialized against the mid-decade "re-redistricting," and all told more than 130 such editorials were published.

During the first special session, despite widespread public opposition, the House quickly passed a new congressional map. The Senate Jurisprudence Committee also took up congressional redistricting in the first special session. On July 23, 2003, the Senate Committee voted along party lines to approve a new plan. But in the full Texas Senate, the attempt to enact a new congressional map failed in the first special session when eleven state senators (more than a third of the chamber) announced that they were opposed to taking up congressional redistricting legislation. It has been a long-standing tradition of the Texas Senate to require that a measure receive support of a two-thirds supermajority before the full Senate will consider it.

Defendant Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting. *See* Ken Herman, *Dewhurst: Redistricting Dead This Session*, Austin Am.-Statesman, July 25, 2003. The decision to abandon the two-thirds rule would apply only to congressional redistricting legislation considered in any second special session, Dewhurst said. *See id.* When information surfaced that the Texas Senate would adjourn *sine die* on June 29, 2003, and would convene a second special session five minutes later, eleven Texas senators left the State to deprive the Senate of a quorum. Although lacking a quorum, the Republican Senators voted to fine their Democratic colleagues up to $5,000 per day and to revoke privileges for their staffs. Among other penalties, they also forbid absent legislators from obtaining flags that have flown over the Capitol to give to bereaved constituents. *See* Gromer Jeffers, Jr., *Runaway Democrats Expand Lawsuit; Dewhurst Aide Says Maneuver an Attempt to Stall Redistricting*, Dallas Morning News, Aug. 21, 2003. The eleven senators stayed out of State for a month. But as the second special session ended, one of the absent senators announced that he would return to the State. The remaining ten, unable to prevent a quorum, announced that they too would return.

On September 9, 2003, Governor Perry called a third special session. The House and Senate passed a new congressional map, known as "Plan 1374C," on October 10 and 12, 2003, respectively, on near-perfect party-line votes. Every Hispanic and African-American Senator and all but two of the minority Representatives voted against Plan 1374C. (The Texas Legislative Council's (TLC's) maps and statistical package for Plan 1374C, as well as an "interactive map," are available on the TLC's Web site at http://www.tlc.state.tx.us/research/redist/redist.htm.)

Plan 1374C was designed to produce one likely outcome: the defeat of at least seven incumbent Democratic Members of Congress. Based on recent statewide election returns, of the 32 districts in the plan, 22 would be safely Republican while the other 10 would be packed with Democratic voters. Dallas and Tarrant Counties, for example, would contain parts of eight districts, seven of which lean strongly Republican, and would lose one of its two current districts that are effectively controlled by African-American voters. And throughout the State, district lines would be shifted to assure that the six Democrats elected primarily from rural Republican-leaning districts would no longer represent their long-time constituents and thus would have little chance of winning reelection. The defeat of these six Representatives (Congressmen Stenholm, Hall, Edwards, Lampson, Sandlin, and Turner), plus Congressman Frost from the Dallas-Fort Worth district, would cost Texas 114 years of combined seniority in the U.S. House of Representatives.

To maximize partisan advantage, the Legislature shunted aside Texas's traditional redistricting principles. Of course, the first traditional principle thrown overboard was the prohibition on mid-decade "re-redistricting." Furthermore, the new map would *increase* county splits (splitting 28 counties into 71 pieces), *decrease* district compactness (as measured by both of the TLC's quantitative methods), rip apart communities of interest, and move more than 8.1 million Texans into new districts where they would be deprived of the opportunity to vote for incumbents who have served them well and against incumbents who have served them poorly.

Perhaps what is most amazing about the way Plan 1374C redistributes Texas's voters is the complete eradication of competitive districts where candidates are forced to appeal to centrist, independent, ticket-splitting voters. Plan 1374C does not contain a single truly competitive district. All 32 districts have been divvied up between the parties, with the

Republicans getting 22, Democrats getting 10, and independent voters and ticket-splitters exercising little if any influence anywhere. "'The final result seems not one in which the people select their representatives, but in which the representatives have selected the people.'" *Bush v. Vera*, 517 U.S. 952, 963 (1996) (plurality opinion) (citation omitted).

ARGUMENT

The Framers of our Constitution designed the House of Representatives to be the most responsive and democratic organ of our national government. In designing the House to foster democratic accountability, the Framers had to accommodate, on the one hand, the need for equal representation for equal numbers of people, and on the other hand, the need for stability in relations between the Representatives and the represented. Stable relations between Representatives and their constituents allow voters to reward effective Representatives with reelection, while weeding out the others. But over time, a completely stable set of constituencies would have become wildly unequal in population and thus would have undermined the Framers' other goal, equal representation. The Framers considered leaving to Congress the job of reconciling these partially conflicting goals of stability and equality, but ultimately rejected that approach because its Members would have too much of a vested interest in the status quo and equality therefore would suffer.

Instead, the Framers set up a rigid, fixed calendar of biennial House elections and decennial reapportionment of Representatives among the States. Thus, four out of every five elections would promote stability; and every fifth election (after the decennial census) would readjust constituencies to reflect population shifts that had occurred in the previous ten years and thereby would promote equality. It can hardly be disputed that the plain text of Article I establishes this rhythm – one post-reapportionment election cycle, followed by four regular

election cycles. Nor can it be disputed that a round of mid-decade reapportionment of congressional seats *among* the several States would flatly violate Article I of the Constitution.

But Defendants will argue that congressional redistricting *within* a given State can occur any time in the decade, for any reason. Here, there is no serious dispute over the reason: partisan maximization. And if Defendants' argument is correct – that Article I places temporal constraints on congressional reapportionment but not on congressional redistricting – then what happened in Texas this year will soon become the norm. *Biennial* redistricting will allow any political party that wins momentary control of the Legislature and governorship to entrench its power through an initial gerrymander, and then to "fine tune" the gerrymander every two years. Partisan cartographers will stay one step ahead of the voters and thus insulate themselves from all but the strongest electoral tides. Such a distorted and fundamentally antidemocratic process cannot possibly be squared with the Framers' vision of a House of Representatives controlled by "the People of the several States."

I. The Federal Constitution Guarantees to "the People of the Several States" the Right to Choose Who Will Represent Them in the United States House of Representatives, Without Undue Interference from Their State Legislatures.

A. The Framers Established a System of Decennial Reapportionment and Biennial Elections to Hold the House of Representatives Directly Accountable to the Voters.

The Framers of the Federal Constitution vested the legislative powers of the national government in a bicameral Congress of the United States, consisting of a Senate and a House of Representatives. U.S. CONST. art. I, § 1. Under the "Great Compromise" that broke the logjam between the large-state and small-state delegations at the Federal Convention in Philadelphia, the Senate would represent the States, while the House of Representatives would represent the People. *See Wesberry*, 376 U.S. at 12-13. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 57-93 (1996). Thus, two

Senate seats were apportioned to each State, regardless of its size. U.S. CONST. art. I, § 3, cl. 1. But in the House, Representatives were to be periodically apportioned on the basis of population. *See Wesberry*, 376 U.S. at 7-18 (interpreting U.S. CONST. art. I, § 2, cl. 1).[3]

For the Republic's first 124 years, until passage of the Seventeenth Amendment provided for their direct election, U.S. Senators were chosen by the state legislatures. *See* U.S. CONST. art. I, § 3, cl. 1; *see also id.* amend. XVII. Allowing the state legislatures to dictate membership in the Senate made sense precisely because the Senate represented the States, not the People. Legislative appointment was also the most familiar basis for nationwide representation, as the state legislatures had appointed delegates to the Continental Congress under the Articles of Confederation. *See* RAKOVE, *supra*, at 205-08.

By contrast, Representatives would be directly elected for two-year terms "by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. As George Mason of Virginia explained at the Convention, the House of Representatives "'was to be the grand depository of the democratic principle of the Govt.'" 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND]. "Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995). John Adams had argued that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them." John Adams, *Thoughts on Government* (1776), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 403 (Charles S.

[3] Prior to Reconstruction, the apportionment base for the House included only three-fifths of the slave population. *See* U.S. CONST. amend. XIV, § 2 (amending that aspect of Article I).

Huneman & Donald S. Lutz eds., 1983). Likewise, at the Federal Convention, James Wilson of Pennsylvania advocated a national legislature that would be "'the most exact transcript of the whole Society.'" 1 FARRAND, *supra*, at 132.

Regular biennial elections were one of the two linchpins to making the House of Representatives a "miniature" or "exact transcript" of the people. Unlike the parliamentary system, in which the government controls – and sometimes manipulates – the timing of each election, congressional elections were to be held like clockwork, every 24 months. In the Federalist Papers, Madison argued that the "liberties of the people of America" would be best secured "under biennial elections, unalterably fixed by [the] constitution." THE FEDERALIST No. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961). Justifying the choice of 24-month terms at the Massachusetts ratifying convention, Fisher Ames explained that "'[t]he term of election must be so long, that the representative may understand the interest of the people, and yet so limited, that his fidelity may be secured by a dependence upon their approbation.'" 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 46 (Jonathan Elliot ed., 2d ed. 1888).

Indeed, the House of Representatives' direct accountability and close ties to the people were unique in the Framers' constitutional design. While the Justices were to be appointed for life, the President and Vice President were to be elected indirectly by the Electoral College for four-year terms, and the Senators were to be chosen by the state legislatures for six-year terms, Representatives were to be held directly accountable to the People through *biennial* elections. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 574 (1833) ("The house of representatives is required to be composed of representatives chosen by

the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; the influence direct; and the responsibility direct.").

The second linchpin to creating a House of Representatives that mirrored society as a whole was the principle of "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. When the Constitution was drafted in 1787, the Framers' estimates for the populations of each State – and hence their initial allocation of Representatives among the 13 States, *see* U.S. CONST. art. I, § 2, cl. 3 – were "'little more than a guess.'" 1 FARRAND, *supra*, at 560 (Gouverneur Morris of Pennsylvania); *see also Utah v. Evans*, 536 U.S. 452, 475-76 (2002) (noting that the original allocation of seats was based on "conjecture").

Recognizing that this initial apportionment might not reflect the actual populations of the States, and wishing to minimize the politicization of future reapportionments, the Framers provided for a decennial federal census of population. *See* U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as [Congress] shall by Law direct."). The purpose of the census was to correct "creeping malapportionment." Without periodic adjustment, residents of faster-growing States would inevitably become under-represented and lose power to residents of slower-growing States. The purpose of reapportionment, then, was to equalize district populations so that votes cast for congressional candidates could be more accurately and equitably translated into congressional seats. Absent this periodic adjustment, over time the House would stagnate and become increasingly unrepresentative of the people. As Hamilton explained in the Federalist Papers, an "actual census or enumeration of the people . . . effectually shuts the door to partiality or oppression"

and preserves their power to choose their Representatives. THE FEDERALIST No. 36, at 220 (Alexander Hamilton).

The Framers left to Congress most of the specifics of the federal census of population. See U.S. CONST. art. I, § 2, cl. 3 (mandating that the "actual Enumeration" be conducted "in such manner as [Congress] shall by Law direct"). But one specific they refused to leave in Congress's hands was the census's frequency. The Constitution expressly provides for a census to reapportion Representatives among the States every "ten Years." *Id.* Absent that requirement, the Framers feared, the tendency of politicians to become too comfortable with the status quo would surely have resulted in ever-lengthening gaps between censuses and therefore between reapportionments. See RAKOVE, *supra*, at 72-74; 1 FARRAND, *supra*, at 578-79 (discussing the need to specify a time frame for periodic reapportionment, to remove the task from the discretion of those in power).

Initially, some delegates to the Convention suggested that the Constitution simply authorize Congress to augment the number of Representatives "from time to time." 1 FARRAND, *supra*, at 559. But it was quickly pointed out that, "if . . . left at liberty, [Congress] will never readjust the Representation." *Id.* at 571. This concern stemmed from a deep distrust of those in power. George Mason cautioned, "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it." *Id.* at 578. So Edmund Randolph of Virginia introduced a motion requiring Congress "to take a periodic census for the purpose of redressing inequalities in the Representation." *Id.* Various time periods were suggested, including intervals of fifteen and twenty years, before ten years was finally agreed upon. *Id.* at 590, 596. Also rejected – apparently because it lacked the desired regularity – was

Madison's proposal to modify the term of years by prefacing it with the words "at least." *Id.* at 588.

By fixing in the text of the Constitution the intervals between elections and the intervals between censuses, the Framers established a rigid and unyielding calendar of decennial reapportionment and biennial voting "by the People of the several States." By removing from Congress the control over the frequency of the census, and instead setting a mandatory decennial schedule for reapportionment, the Framers established a regular ten-year cycle, in which constituencies would be altered only every fifth election. *See* 2 U.S.C. § 2a(a) (requiring Congress to reapportion during "the first regular session of the Eight-second Congress *and of each fifth Congress thereafter*" (emphasis added)).

That pattern balances two competing risks to democratic accountability. On the one hand, in a fast-growing society like the early Republic, leaving electoral constituencies unchanged for too long would thwart the principle of equal representation for equal numbers of people and thereby render the government unresponsive to the people. But on the other hand, changing constituencies too frequently would frustrate the people's ability to evaluate their Representatives knowledgeably and to hold them in check by voting for the ones who represented them well and against the ones who represented them poorly. Only after extensive debate did the Framers conclude that reapportioning congressional seats before every fifth election cycle would best balance and minimize these twin risks. Writing a half century later, Justice Story lauded the Founders for the "wisdom" of this decennial schedule and predicted that it may have averted "gross abuses, . . . feuds, and discontents" that otherwise could have brought on the "dissolution of the Union." 2 STORY, *supra*, § 644.

B. Consistent with Article I, Congress Has Enacted a Detailed Schedule for the Decennial Census and Reapportionment.

Exercising its Census Clause authority, Congress has established the years ending with "0" (*e.g.*, 1790, 1800, etc.) and with "1" as the time for taking the decennial census and for reporting its results for purposes of reapportionment and redistricting. Under this timetable, the Secretary of Commerce took the most recent federal decennial census on April 1, 2000, *see* 13 U.S.C. § 141(a), and reported the total populations of the 50 States to the President on December 28, 2000, *see id.* § 141(b). By January 12, 2001, the President transmitted to Congress a statement showing the "whole number of persons in each State . . . and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a); *see Utah v. Evans*, 536 U.S. at 461.

On January 16, 2001, the Clerk of the House of Representatives sent to the governor of each State, including Texas, "a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. § 2a(b); *see Utah v. Evans*, 536 U.S. at 461-62. The federal statute expressly provides that, once the Clerk sent that certificate of reapportionment to the Governor, the State "shall be entitled" to the number of Representatives specified in the certificate "until the taking effect of a [new] reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b); *see Utah v. Evans*, 536 U.S. at 461. Thus, the statute confirms that reapportionment is a decennial affair and that any mid-decade reapportionment would be blatantly illegal.

For all practical purposes, the Texas Legislature's redistricting efforts could not commence until March 2001, when the U.S. Census Bureau delivered to Governor Perry and the majority and minority leaders of the Texas Senate and House the official Census 2000 Redistricting Data Summary File for Texas (the so-called "P.L. 94-171 data"), which included

detailed tabulations of population for specific geographic areas within the State, down to the level of census blocks. *See* 13 U.S.C. § 141(c).

Together, these federal census and reapportionment statutes illuminate when the Texas Legislature's decennial "window" for congressional redistricting opens. But the central dispute here is whether that window ever closes and, if so, when. The guiding principle, of course, must be to protect the people's right to vote and the fundamental principle of democratic accountability that drove Article I's Framers. But to fully understand the issue, we must first turn to the Federal Constitution's Elections Clause.

C. The Elections Clause Delegates to the State Legislatures a Limited Power to Redraw Congressional Districts after Each Decennial Reapportionment, But That Power Cannot Be Used to Rig Elections or Undermine Democratic Accountability.

Consistent with the Framers' dictate that reapportionment of congressional districts *among* the States take place once (and only once) a decade, redistricting of congressional districts *within* each State is also a decennial activity. To understand the relationship between reapportionment and redistricting, we first need to identify the source of the power to redraw congressional lines.

No State has the inherent sovereign power to divide its territory and voters into congressional districts – just as no State has the inherent sovereign power to ratify a federal constitutional amendment under Article V. Rather, the Federal Constitution delegates these powers to the States. "Because any state authority to regulate election to [congressional] offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (citations and internal quotation marks omitted); *see also* 2 STORY, *supra*, § 626 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the union.").

The specific provision empowering States to draw congressional districts is the Elections Clause, which provides in full: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1; *see McPherson v. Blacker*, 146 U.S. 1, 26 (1892) (recognizing that the Elections Clause delegates to the States the power of congressional redistricting); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567, 569-70 (1916) (same); *Smiley v. Holm*, 285 U.S. 355, 363-73 (1932) (same); *Holder v. Hall*, 512 U.S. 874, 898 (1994) (Thomas, J., concurring in the judgment) (same); *Bush v. Vera*, 517 U.S. at 1047 (Souter, J., dissenting) (same); *see also Cook v. Gralike*, 531 U.S. at 523 (holding that States may regulate the incidents of congressional elections only within the exclusive delegation of power under the Elections Clause).

The Elections Clause prohibits mid-decade redistricting within a State for precisely the same reason that Article I prohibits mid-decade reapportionment among the States: because it would undermine the Framers' fundamental principle of democratic accountability. The House of Representatives cannot be held accountable to the people if redistricting continually breaks the links between incumbent Representatives and their constituents. *See White v. Weiser*, 412 U.S. 783, 791, 797 (1973) (applauding the State of Texas's good-faith efforts, when redistricting is mandated by new census results, to "maintain[] existing relationships between incumbent congressmen and their constituents"), *cited favorably in Bush v. Vera*, 517 U.S. at 964-65 (plurality opinion) (holding that maintenance of the unique relationship between a Member of Congress and his constituents is a "legitimate state goal" and a "traditional [districting] principle"). As Justice Story explained, "a fundamental axiom of republican governments

[provides] that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents." 2 STORY, *supra*, § 586.

If districts were redrawn between every biennial election, this linkage would be cut, as elections would then routinely place incumbent Representatives before voters who had never been represented by them. A Member of Congress who had served his constituents well could be effectively knocked out of office by shifting his district to an overwhelmingly new set of constituents, while an ineffective and unrepresentative Member could be saved by excising from his district his most dissatisfied constituents. The Constitution tolerates such changes when they are the inevitable result of eliminating population disparities in the wake of a new decennial census. But in the middle of the decade, with no intervening census data to justify change, they are nothing but an affront to our democratic process.

The new Texas redistricting legislation, of course, was specifically designed to cut the links between incumbents Representatives and their constituents. The true motive behind the bill was hardly disguised: The Republican-controlled Legislature sought to manipulate election outcomes in order to maximize partisan gains. As Congressman DeLay bluntly put it: "I'm the Majority Leader, and we want more seats." Suzanne Gamboa, *DeLay, Texas Dems in Redistricting Fight*, Associated Press, May 7, 2003. A central strategy for achieving that goal was breaking up districts in which Republican-leaning voters had strong relationships with long-standing Democratic incumbents, thus undermining accountability and disregarding the Framers' assumption that such changes would occur only every ten years.

Under the Framers' design, the only acceptable limit on the democratic accountability of Representatives flows from the fundamental principle of equal representation for equal numbers

of people. *See Wesberry*, 376 U.S. at 18. While the Constitution expresses that principle most clearly with regard to inter-state congressional reapportionment, the U.S. Supreme Court has made clear for four decades now that the principle applies no less to intra-state congressional redistricting. *See, e.g., id.* at 7-18. Thus, after each new decennial census (in 1971, 1981, 1991, and 2001), every State entitled to more than one Member of Congress has been required to redraw its congressional districts to make them substantially equal in population. Otherwise, the plan left over from the previous decade will violate the "one person, one vote" rule. *See Georgia v. Ashcroft*, 123 S. Ct. 2498, 2515 n.2 (2003) ("After the new enumeration, no [existing] districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years."); *Karcher v. Daggett*, 462 U.S. at 730-44; *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675-78 (M.D. Pa.) (three-judge court) (invalidating a plan because the populations of its largest and smallest districts differed by 19 persons), *appeal dismissed as moot sub nom. Jubelirer v. Vieth*, 123 S. Ct. 67 (2002).

Here, the State of Texas had a federal constitutional obligation to redraw its congressional districts before the 2002 elections. The Legislature defaulted. After the 2002 elections, the State no longer had a duty or a legitimate reason to draw districts again. Absent an intervening census, there can be no need to adjust the number of districts and no reliable, official data upon which to adjust the sizes of the districts. Indeed, once a new redistricting plan is put in place at the beginning of the decade, "States operate under the legal fiction that [for the remainder of the decade] . . . the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 123 S. Ct. at 2515 n.2. Even if plaintiffs present overwhelming demographic evidence that their district has become wildly overpopulated, this "legal fiction" deprives them of any right to a mid-decade adjustment. That legal fiction reflects the countervailing interest in maintaining

existing districts for ten years at a time: Article I requires exact population equality at the beginning of the decade but tolerates deviations that appear between censuses because representation of the people would be undermined, rather than improved, by allowing mid-decade changes.

Of course, far from being an effort to adjust for post-census population shifts,[4] the Texas Legislature's mid-decade redistricting was merely an improper usurpation of the power that Article I reserves to "the People of [Texas]." Perhaps not surprisingly, such mid-decade redistrictings are unheard of in the modern era – the sole exceptions being the congressional gerrymanders enacted by the Texas and Colorado legislatures this year.[5] And perhaps equally unsurprising, these mid-decade redistrictings have cropped up this year only in States where a political party that lacked unilateral control over the redistricting process in 2001 has subsequently gained a vise grip on state government and seeks to entrench its newfound power.

This case will help decide if redistricting is an endless game played after each election, or whether it will be a once-a-decade activity as the Framers intended. Since *Baker v. Carr*, 369 U.S. 186 (1962), kicked off the "Reapportionment Revolution" in 1962 and *Wesberry v. Sanders, supra*, established the strict one-person, one-vote rule for congressional redistricting in 1964, 50 States have gone through 20 biennial election cycles. Yet none has ever shown the audacity exhibited by the Republican leadership of Texas this year. The U.S. Supreme Court's

[4] The Jackson Plaintiffs incorporate by reference, adopt, and join Travis County's and the City of Austin's motion for summary judgment on the basis that Plan 1374C violates Article I's strict population-equality requirement.

[5] The Colorado Attorney General and others are currently challenging Colorado's new congressional plan on state-constitutional grounds. The Colorado Supreme Court heard oral argument on September 8, 2003, and a ruling is expected this fall.

willingness to revisit the issue of partisan gerrymandering this Term (*Vieth v. Jubelirer*, 123 S. Ct. 2652 (2003)) suggests that these sorts of shenanigans will not be lightly tolerated.[6]

II. Nothing in the Texas Constitution Justifies Mid-Decade Congressional Redistricting.

Defendants may point to the Texas Constitution as the authority for mid-decade congressional redistricting. But that argument will not fly. In its submission to the U.S. Department of Justice, seeking preclearance of the new map under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the State claims that it enacted Plan 1374C under the authority of Article III, Section 28, of the Texas Constitution. That claim, however, cannot justify the plan's adoption in the middle of the decade, for three reasons. *First*, as explained above, the State of Texas has no inherent sovereign authority to draw congressional districts; and the Texas Constitution cannot "give" the Legislature any power to draw them. That power flows solely from the Federal Constitution's Elections Clause. Therefore, any provision of the Texas Constitution that directly addresses congressional redistricting would have to be a *limitation* of the power, not its ultimate source. *Second*, by its plain text, Article III, Section 28, refers only to state "senatorial and representative districts" – not congressional districts. TEX. CONST. art. III, § 28. *Third*, even if this Section somehow did apply to congressional districts, it would only undermine Defendants' case because it authorizes the Legislature to redraw districts only "at its first regular session after the publication of each United States decennial census." *Id.*

Defendants may further argue that they had a *duty* to redraw the State's congressional districts and that it would have been an abdication of responsibility *not* to do so. But that duty expired in 2001. As already described, the State – through either its Legislature or its Judiciary – could have created a new 32-district plan anytime between March and October 2001. And even

[6] A complete set of U.S. Supreme Court filings in *Vieth v. Jubelirer* can be downloaded from http://www.jenner.com/news/news_item.asp?id=000012249825.

after this Court ordered Plan 1151C into effect in mid-November 2001, the State remained free – albeit for a brief time – to override that order and enact its own plan. If the Governor and the Legislature had been so disgruntled with this Court's order mandating use of Plan 1151C for elections in 2002 and thereafter, they could have held a special session and lawfully enacted a different plan superseding the court-ordered map. But they chose not to do so. The Governor opted not to call any special session in 2001 and then directed the Attorney General to *defend* Plan 1151C before the U.S. Supreme Court. Once the March 2002 primary elections were held under the Court-drawn map, the Legislature had no power to act again until the winter of 2011, when the next census will render Plan 1151C unconstitutional and reopen a new "window" for congressional redistricting. Having defaulted on its constitutional duty in 2001 and passed the role of drawing a constitutional plan to the courts, the Legislature cannot redraw a perfectly lawful congressional map in the middle of a decade.

III. Powerful Prudential Concerns Support a Constitutional Prohibition on Mid-Decade Congressional Redistricting.

In addition to these historical and structural arguments, there are at least four powerful prudential reasons why the Federal Constitution prohibits mid-decade congressional redistricting.[7]

First, a constitutional ban on mid-decade redistricting maximizes the chance that the same districting plan will be used for five consecutive election cycles and therefore fosters the democratic accountability that the Federal Framers sought when they combined decennial reapportionment with biennial elections. By contrast, Defendants' theory apparently allows the legislature to redraw districts – and reshuffle constituents – between *every* congressional

[7] Some of the ideas presented in this (and other parts) of this motion will be further discussed in Professor John R. Alford's expert report, which the Jackson Plaintiffs will serve on all parties tomorrow. The Jackson Plaintiffs therefore will file with the Court courtesy copies of the text of Professor Alford's report.

election. If the Legislature can enact a new plan every two years, then the risk of partisan entrenchment escalates dramatically. In 2005, Republican strategists can scour the 2004 precinct-level election returns and then fine tune their gerrymander for 2006 by enacting "Son of 1374C." Then in 2007, they can scour the 2006 returns and craft "Grandson of 1374C." And so on and so forth. By tweaking the map between each election, they can virtually eliminate any risk that a long-term swing in public opinion might jeopardize the Republican-held congressional seats. That would be, in this Court's words, "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *Balderas*, slip op. at 10.

Second, biennial congressional redistricting will exact heavy costs on the state legislatures. Although Defendants will pitch mid-decade redistricting as a state prerogative protected by fundamental principles of federalism, in reality it will be a perversion of federalism. Just as Congressman DeLay drove the process here in Texas this year, the national political parties will increasingly come to treat the state legislatures as tools in their battle for control of Congress. Before this decade, congressional leaders generally stayed away from *state-legislative* redistricting. Although the 1991 state-legislative map in theory might have some impact on the 2001 congressional map, the connection was too attenuated to attract much attention from Washington. But if the 2001 state-legislative map can generate one-party control of both chambers, which can then turn around and immediately redraw the congressional plan, the national party leaders will be unable to resist injecting themselves into state-legislative redistricting, state-legislative campaigns, and ultimately state-legislative agenda-setting and policymaking. The last time America witnessed this kind of intrusion into state-legislative affairs by national political players was in the late nineteenth and early twentieth centuries, when

the state legislatures' power to select U.S. Senators was turning them into a plaything of the national politicians. The passage of the Seventeenth Amendment in 1913 was primarily an effort to extricate the state legislatures from national partisan politics. Continuous congressional redistricting threatens similar harms today.

Third, allowing congressional redistricting only once per decade, at the beginning of the decade, serves as a powerful brake on partisan gerrymandering. If, in the immediate aftermath of reapportionment, the Governor and the legislature deadlock on the issue of congressional redistricting, a court must fill the void; and court-drawn plans typically have little or no partisan bias. If the deadlock is broken two or four or six or eight years later, it will likely be because one of the two political parties has (for the first time in the decade) gained unilateral control of the redistricting process and wishes to seize advantage of that control to maximize its partisan advantages. That, of course, is precisely what happened here. With Republicans controlling the governorship and the Senate, but Democrats controlling the House in 2001, deadlock ensued and the judiciary had to fill the legislative void. Only after Republicans captured the Texas House and thereby gained the power to run roughshod over the rival party did they return to the congressional drawing board. By prohibiting the legislature from replacing a perfectly lawful map in the middle of the decade, the Constitution constrains precisely the kind of partisan power-grab that Texas witnessed this year – "a bloodfeud, in which revenge is exacted by the majority against its rival." *Balderas*, slip op. at 10.

Fourth, and relatedly, the Constitution's timing rule eliminates a disincentive for bipartisan compromise. If neither party has unilateral control at the beginning of the decade, then leaders of both political parties know they have a choice between cutting a bipartisan deal or letting the courts dictate the congressional map for the rest of the decade. Risk aversion may

force the two sides toward a bipartisan, legislatively crafted compromise. By contrast, under Defendants' interpretation of the Constitution, a political party that controls two of the three "levers" of redistricting power (as the Republicans did in 2001, with the governorship and the Senate) may prefer to throw a wrench into any bipartisan compromise proposal in the hope that they will gain control over all three levers after an election or two, at which time they can enact a full-throated partisan gerrymander. By holding out the prospect for potentially huge gains later in the decade, Defendants' interpretation of Article I would only exacerbate the likelihood of more Plan 1374Cs in Texas's future. *See* David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A21 ("'Republicans used the court-drawn plan as a place to park redistricting until they could address the issue when they were in control of [both legislative chambers]. . . . You give it to the courts knowing that, after 2002, you'll take it back.'") (quoting Rice University political-science professor John R. Alford).

* * * * *

If this Court allows the State to implement Plan 1374C for the 2004 elections, literally millions of Texans will have been needlessly shuffled from one district in 2000 to another district in 2002 to yet another in 2004. What will matter most to these voters is not whether the disruption was caused by a court or by the legislature, but that they can hardly keep track of who will be on the next ballot, or who they should call for help when their check from Social Security or the Veterans' Administration doesn't arrive. Their rights to participate meaningfully in our political process, on an equal footing with all other Texans and all other Americans, will have been unconstitutionally abridged.

WHEREFORE, the Jackson Plaintiffs pray that this Court will enter an Order barring Defendants from implementing Plan 1374C or any congressional redistricting plan other than Plan 1151C until after the 2010 federal decennial census.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL.	§	
vs.	§	CIVIL ACTION NO. 2:03-CV-354
RICK PERRY, ET AL.	§	Consolidated

PROPOSED ORDER

The Court hereby grants the Jackson Plaintiffs' motion for summary judgment on the ground that Article I of the United States Constitution prohibits the State of Texas from altering its lawful congressional districting plan after the 2002 elections and before the 2010 federal decennial census. Defendants are hereby barred from implementing Plan 1374C or any congressional redistricting plan other than Plan 1151C until after the 2010 federal decennial census.

So **ORDERED** and **SIGNED** this _____ day of December, 2003.

_____
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

_____
LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

_____
T. JOHN WARD
UNITED STATES DISTRICT JUDGE